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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN GOMEZ,

Defendant and Appellant.

B236579

(Los Angeles County Super. Ct.
No. VA104973)

APPEAL from a judgment of the Superior Court of Los Angeles County, John A. Torribio, Judge. Affirmed as modified.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Analee J. Brodie, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Juan Gomez guilty of one count of willful, deliberate, and premeditated attempted murder (Pen. Code, §§ 664, 187, subd. (a)).¹ The jury found true allegations that defendant personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subds. (b)-(d)) and personally inflicted great bodily injury (§12022.7, subd. (a)). In a separate proceeding, the trial court found there was insufficient evidence to establish defendant was legally insane at the time he committed the offense.

The trial court sentenced defendant to 25 years to life on count 1 and imposed two enhancements—25 years to life pursuant to section 12022.53 and 3 years under section 12022.7, subdivision (a).

In a previous appeal, the judgment was reversed and the cause remanded for a trial solely on the issue of sanity. The trial court was ordered to correct defendant's sentence for attempted murder to reflect an imposed term of life with the possibility of parole and to stay the section 12022.7, subdivision (a) enhancement as required by section 12022.53, subdivision (f).

On remand, the jury found defendant sane at the time of the offense. The trial court sentenced defendant to life for attempted murder (§§ 664, subd. (a), 187) and a consecutive enhanced term of 25 years to life (§ 12022.53, subd. (d)). It also imposed an enhanced term of three years pursuant to section 12022.53, subdivision (f), which it stayed pursuant to section 654.

Defendant argues the trial court erred in refusing to augment CALJIC No. 4.00, the insanity defense instruction, with respect to the issue of moral right and wrong, in violation of his due process rights. Defendant also asserts the abstract of judgment and minute order must be corrected to properly reflect the court's oral pronouncement at resentencing and the prior order on the original appeal. The Attorney General disputes the first contention but concedes the second.

¹ Unless otherwise indicated, all statutory references are to the Penal Code.

We direct the trial court to correct the errors in the abstract of judgment and minute order to conform to the trial court's pronouncement at resentencing and the Court of Appeal's prior order. In all other respects, the judgment is affirmed.

FACTS

At about 9:00 p.m. on March 13, 2008, victim Ruben Carrillo was standing in his backyard by his shed when he heard sounds like "firecrackers." He felt something hit him and fell to the ground. Carrillo heard more gunshots and the sound of bullets hitting his shed. He was shot through the chest and suffered broken ribs and a punctured lung, which required hospitalization.

On March 20, 2008, Deputy Art Gabriel and his partner responded to a report of a suspicious person in the backyard of Carlos Guerrero, who was Carrillo's neighbor. When they reached Guerrero's yard, they found defendant standing against a wall wearing jeans, a black long-sleeved tee shirt, and knit gloves. When they asked what defendant was doing there, he responded that someone was chasing him. Deputy Gabriel ordered defendant to the ground and discovered a loaded handgun in defendant's waistband. The deputies found a beanie with holes cut out of it near the place defendant had been standing.

Later that day, defendant was interviewed by Detective Spencer Reedy. Defendant told the detective that he was hiding in the area because some guys were chasing him.

Detective Reedy asked defendant what happened on the night of Carrillo's shooting. Defendant responded that he was sure the detective already knew. He then recounted that he had previously lived in his brother-in-law Guerrero's house and had become suspicious that Carrillo had raped his wife. Defendant believed his wife was not the only person this had happened to and thought that other neighbors had likely been molested by Carrillo. Defendant never spoke to his wife about his suspicions, but he

knew the rape had occurred. When his wife gave birth to his infant daughter, the child looked just like Carrillo and had light eyes like Carrillo.

After about two months, defendant could no longer tolerate that Carrillo had gotten away with the rape. He purchased a gun and went to Guerrero's backyard on the night of the shooting. He reached over the wall between the properties and shot Carrillo. He fired all his bullets and left.

Defendant did not think he killed Carrillo, so he returned to the area on the day of his arrest to finish the job. He was carrying the same gun and wearing the same mask he had on the night of the shooting. He watched and waited for Carrillo from where he was hiding in a neighbor's yard. Someone saw him so he ran off, but he returned ten minutes later. Deputy Gabriel and his partner discovered defendant at the location.

Defendant told Detective Reedy that he knew he had messed up the lives of his wife and daughter. He understood the authorities took rape charges seriously but could not comprehend why they had not put a stop to Carrillo's actions. He was upset that he could not look up sex offenders on the internet without paying a fee. Defendant said Carrillo had "fucked up," and he felt better because he shot at Carrillo. Defendant thought his other neighbors also felt better after the shooting. He admitted that he knew what he had done was wrong. In a later handwritten statement, defendant reiterated that he was certain his wife had been raped and that his actions were "not the best," but no one should have to endure what he had.

Defendant's wife told Detective Reedy that defendant was the father of her child, and Carrillo had not raped her. Carrillo testified that he knew a family had lived in Guerrero's house. He had been at parties with defendant, where defendant had handed him food and drinks. Carrillo only knew defendant's wife enough to say hello and goodbye. He did not know her name. Carrillo and defendant had never argued about anything. Carrillo testified that his eyes, as well as all of his children's, are brown.

Dr. Kaushal Sharma, a forensic psychologist, was appointed to evaluate whether defendant was mentally competent to stand trial and to evaluate him for the sanity trial. He interviewed defendant twice, reviewed the police and investigative reports, and

defendant's jail mental health records. Dr. Sharma testified that, in his opinion, defendant was mentally ill at the time of the shooting. Defendant's mental illness may have been due, in part, to substance abuse. He concluded that defendant was unable to distinguish moral right from wrong at the time of the shooting because defendant believed that Carrillo had raped his wife and would molest other people, and thought he was acting for the greater good.

DISCUSSION

Whether the Trial Court Erred in Refusing to Augment CALJIC No. 4.00

The jury was instructed under CALJIC No. 4.00 as follows:

"The defendant has been found guilty of the crime of attempted premeditated murder.

"You must now determine whether he was legally sane or legally insane at the time of the commission of the crime. This is the only issue for you to determine in this proceeding. You should consider all of the evidence received in the guilt phase of this trial along with all the instructions you have been given.

"You may consider evidence of his mental condition before, during and after the time of the commission of the crime, as tending to show the defendant's mental condition at the time the crime was committed.

"Mental illness and mental abnormality, in whatever form either may appear, are not necessarily the same as legal insanity. A person may be mentally ill or mentally abnormal and yet not be legally insane.

"A person is legally insane when by reason of mental disease or mental defect, he was incapable at the time of the commission of the crime of one of the following:

- "1. Knowing the nature and quality of his act; or
- "2. Understanding the nature and quality of his act; or
- "3. Distinguishing what is legally right from what is legally wrong; or

“4. Distinguishing what is morally right from what is morally wrong.

“Conduct that is morally wrong is conduct that violates generally accepted standards of moral obligation. Legal wrongfulness and moral wrongfulness are often equivalent but that is not always the case.

“The defendant has the burden of proving legal insanity at the time of the commission of the crime by a preponderance of the evidence.

“However, this defense of legal insanity does not apply when the sole or only basis or causative factor for the mental disease or mental defect is a personality or adjustment disorder, or an addiction to, or an abuse of, intoxicating substances.”

Prior to the trial court instructing the jury, the defense requested that it augment CALJIC No. 4.00 with the following language:

“The word [‘]wrong,[’] as used in the instruction, is not limited to legal wrong, but properly encompasses moral wrong as well. Thus the defendant who was incapable of distinguishing from [*sic*] what is morally right from what is morally wrong is insane, even though he may understand the act is unlawful.”

Defendant argues his state law and federal constitutional rights were violated because the trial court refused to augment CALJIC No. 4.00 as he requested. He asserts CALJIC No. 4.00 as given was unclear, as evidenced by the body of case law distinguishing the requirements for proving legal insanity, which have often been misinterpreted by juries and courts. Defendant contends the instruction’s language, which states “[l]egal wrongfulness and moral wrongfulness are often equivalent but that is not always the case . . . ,” conflates legal and moral wrong, impermissibly heightening his burden of proof.

“A trial court must instruct the jury, even without a request, on all general principles of law that are “‘closely and openly connected to the facts and that are necessary for the jury’s understanding of the case.” [Citation.] . . . ’ [Citation.]” (*People v. Burney* (2009) 47 Cal.4th 203, 246 (*Burney*)). The trial court’s duty to so instruct extends to defenses upon which defendant relies or for which there is substantial evidence in the record, so long as the defense is consistent with the defendant’s theory of

the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 157.) “‘An instruction should contain a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court as to any fact in issue.’ [Citations.]” (*People v. Wright* (1988) 45 Cal.3d 1126, 1135.) The trial court may reject an instruction that incorrectly states the law, or is not supported by substantial evidence, is argumentative, duplicative, or presents a possibility of confusing the jury. (*Burney, supra*, at p. 246.)

We review a claim of instructional error de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.) “In conducting this review, we first ascertain the relevant law and then ‘determine the meaning of the instructions in this regard.’ [Citation.] [¶] The proper test for judging the adequacy of instructions is to decide whether the trial court ‘fully and fairly instructed on the applicable law . . .’ [Citation.] “‘In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]’” [Citation.] ‘Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.’ [Citation.]” (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112.)

Defendant does not argue that CALJIC No. 4.00 incorrectly states the law, but instead that the proposed modification is needed to clarify that if the defendant was unable to distinguish between legal right and wrong or moral right and wrong at the time he committed the crime, the jury must find him to have been legally insane. He contends the proposed language of the modification, taken from *People v. Torres* (2005) 127 Cal.App.4th 1391, 1402 (*Torres*), provides the needed clarification. Defendant is correct that *Torres* accurately states the law, however, the proposed modification is duplicative of the existing instructional language and would not have provided the jury with anything beyond what it learned from CALJIC No. 4.00 as given. Because it was merely duplicative, the modification was properly refused by the trial court. (*People v. Ochoa* (2001) 26 Cal.4th 398, 455.)

In *Torres*, the jury was instructed under former CALJIC No. 4.00 (Oct. 2005 ed.) that a defendant is insane if, “by reason of mental disease or mental defect, he was incapable of either: [¶] 1. Knowing the nature and quality of his act; or [¶] 2. Understanding the nature and quality of his act; or [¶] 3. Distinguishing right from wrong at the time of the commission of the crime. . . .” (*Torres, supra*, 127 Cal.App.4th at p. 1400.) The trial court modified the instruction to add: “The term “wrong” refers to both legal wrong and moral wrong. The concept of moral wrong refers to society’s generally accepted standards, and not to the subjective standards of the defendant.” (*Ibid.*, italics omitted.) The *Torres* court held that the trial court erroneously instructed the jury, because “[the] instruction required defendant to prove that he could not distinguish legal right from legal wrong, in addition to moral right from moral wrong” (*Id.* at p. 1402, italics omitted.) It thus placed a higher burden on the defendant, who was only required to prove that he was unable to distinguish moral right from moral wrong or moral right from moral wrong, as opposed to both elements. (*Ibid.*)

As a result of the court’s holding in *Torres*, CALJIC No. 4.00 was revised in 2006 to reflect that “[a] defendant is legally insane . . . if he or she is unable to distinguish what is legally right from what is legally wrong, *or* what is morally right from what is morally wrong.” (Com. to CALJIC No. 4.00 (2008 Rev.) (7th ed. 2005), emphasis added). Revised CALJIC No. 4.00 removed the offending language of the third prong of the insanity test, which did not distinguish between moral and legal wrong. The current version of CALJIC No. 4.00 replaced the erroneous language with the current third and fourth prongs, which list the inability to distinguish legal wrong and the inability to distinguish moral wrong separately, thereby remedying the inaccuracy in the instruction identified in *Torres*. Separately stating the elements of legal wrong and moral wrong, and framing them in the alternative, rather than the conjunctive, makes clear that the defendant must be found insane if either of the elements is met. The instruction requires no further clarification.

Furthermore, the language defendant takes specific issue with—that “[l]egal wrongfulness and moral wrongfulness are often equivalent but that is not always the

case. . . .”—does not conflate the two elements or create a presumption that a defendant must be found to have been able to distinguish moral right from wrong if the jury finds he could distinguish legal right from wrong. The plain meaning of the language highlights the limited distinction between moral and legal wrong, as expressed by the Supreme Court in *People v. Skinner* (1985) 39 Cal.3d 765, 777-784 (*Skinner*). Quoting Justice Cardozo’s opinion in *People v. Schmidt* (1915) 216 N.Y. 324, 338-340 with approval, *Skinner* reasoned that: “‘Knowledge that an act is forbidden by law will in most cases permit the inference of knowledge that, according to the accepted standards of mankind, it is also condemned as an offense against good morals. Obedience to the law is itself a moral duty.’ . . . [Citation.]” (*Skinner, supra*, at pp. 783-784). Moreover, the language at issue was taken from this court’s decision in *People v. Stress* (1988) 205 Cal.App.3d 1259, 1275 and states the law correctly.

Because CALJIC No. 4.00 accurately states the law of legal insanity and the requested modification would have, at best, been duplicative, we hold that the trial court did not err in refusing to modify the instruction.²

Correction of the Minute Order and Abstract of Judgment

Although the trial court sentenced defendant to life in prison on count 1 (§§ 664, 187, subd. (a)), the minute order and abstract of judgment reflect the sentence on count 1 was 25 years to life. We agree with the parties that the minute order and abstract of judgment must be corrected to conform to the trial court’s oral pronouncement of judgment. (*See People v. Sharret* (2011) 191 Cal.App.4th 859, 864 [trial court’s oral

² Defendant argues in a footnote that the trial court’s use of the CALJIC instructions rather than the Judicial Council of California Criminal Jury Instructions (CALCRIM) “violate[d] the spirit, if not the letter” of California Rules of Court, rule 2.1050(e). As the Attorney General correctly points out, use of the CALJIC instructions is not a basis for reversal of the trial court’s judgment in and of itself. (*People v. Thomas* (2007) 150 Cal.App.4th 461, 465-466.)

pronouncement controls where there is a conflict between the pronouncement and the minute order or abstract of judgment]).

Additionally, the trial court's order that defendant be sentenced to three years in prison under section 12022.53, subdivision (f), which it stayed pursuant to section 654, is inconsistent with this court's direction in defendant's earlier appeal that an enhancement be imposed under section 12022.7 and stayed pursuant to section 12022.53, subdivision (f).

DISPOSITION

The trial court is instructed to correct the abstract of judgment and minute order at resentencing to reflect (1) that defendant was sentenced to life in prison as to count 1, and (2) the imposition of the three-year term under section 12022.7 is stayed pursuant to section 12022.53, subdivision (f). The clerk of the superior court shall send a copy of the corrected abstract of judgment and minute order to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.